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# The Use of False DNA Evidence to Gain a Confession During Interrogation is Classic Coercion: Why Such Coerced Confessions Should Not be Admissible in a Criminal Trial

Andrea Reed<sup>1</sup>

## INTRODUCTION

In October, 1992, five black teenagers were arrested and subsequently confessed to brutally assaulting and murdering a fourteen-year-old girl. Years later, DNA evidence proved these young men innocent. Today, these men are still in jail for crimes they did not commit.<sup>2</sup> Despite growing evidence to the contrary, prevailing theory still dictates that an innocent person will not be convicted of a crime in America.<sup>3</sup> “Like many criminal justice officials, most people appear to believe in what . . . has [been] labeled ‘the myth of psychological interrogation’: that an innocent person will not falsely confess to a serious crime . . . .”<sup>4</sup> This myth continues to play an integral role in the criminal justice system. Prosecutors, judges, and jurors alike “place almost blind faith in the evidentiary value of confession evidence,”<sup>5</sup> trying and convicting defendants because the confession—even though false—is seen as a clear indication of guilt. This remains true even when the confession is not reliably corroborated, is the result of police misconduct, and where there exists “compelling evidence of the defendant’s factual innocence.”<sup>6</sup>

Unfortunately, the belief that only guilty persons are convicted is wrong. Innocent people are convicted. Dating back to the 1930s, Edwin Borchard described sixty-five incidents in which innocent people were wrongfully prosecuted, convicted, and incarcerated.<sup>7</sup> Fifty years later, Michael Radelet and Hugo Bedau conducted an in-depth study of the causes of wrongful convictions.<sup>8</sup> In their

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<sup>2</sup> Rashad Robinson, *Innocent, But Forced to Confess – To Murder*, HUFFINGTON POST (Oct. 22, 2011, 9:42 PM), [http://www.huffingtonpost.com/rashad-robinson/dixmoor-five\\_b\\_929926.html](http://www.huffingtonpost.com/rashad-robinson/dixmoor-five_b_929926.html).

<sup>3</sup> Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 901 (2004).

<sup>4</sup> *Id.* at 910.

<sup>5</sup> *Id.* at 996.

<sup>6</sup> *Id.*

<sup>7</sup> EDWIN M. BORCHARD, *CONVICTING THE INNOCENT: ERRORS OF CRIMINAL JUSTICE* xiii (1932).

<sup>8</sup> See Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 23–24 (1987). See also MICHAEL L. RADELET, ET AL., *IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES* 272 (1992) (analyzing an additional one hundred cases).

analysis of 350 cases, they found that in forty-nine of those cases, false confessions directly contributed to the wrongful convictions.<sup>9</sup>

The advances in DNA testing and the ability to apply these methods in criminal justice have played a significant role in studying wrongful convictions and exonerating innocent people. In 1996, Edward Connors, Thomas Lundregan, Neal Miller, and Tom McEwen produced a study using DNA to conclusively show the innocence of twenty-eight wrongfully convicted defendants.<sup>10</sup> In this study, approximately eighteen percent of the convictions involved false confessions or self-incriminating statements.<sup>11</sup> Just ten years later, in 2004, 140 innocent people had been exonerated through the use of DNA evidence.<sup>12</sup> Of those wrongfully convicted, twenty-five percent involved false confessions.<sup>13</sup> As of 2016, 343 innocent people who were wrongly convicted have been exonerated through DNA evidence.<sup>14</sup>

Both the increased sophistication of DNA testing and its use in the criminal justice system have permanently transformed the study of wrongful convictions in America. Perhaps most significantly, the use of DNA testing in post-conviction cases to establish the factual innocence of wrongfully convicted individuals has led to the increased belief that “wrongful convictions occur with regular and troubling frequency in the American criminal justice system, despite our high-minded ideals and the numerous constitutional rights that are meant to procedurally safeguard the innocent against wrongful conviction.”<sup>15</sup> DNA evidence can be and is used to conclusively establish a person’s guilt or innocence. Even more significantly, the increased focus on DNA evidence in the media through popular television shows, such as *C.S.I.*, *Bones*, and *Law & Order*, has led to an increased awareness by the lay person that DNA evidence can be used to establish a person’s guilt or innocence.

As the use of DNA evidence in the criminal justice system increases, how a court rules on the allowance of falsified evidence to obtain a confession could significantly impact the criminal trial process. Two main arguments govern the use of falsified DNA evidence to obtain a confession. The first argument is that this type of interrogation technique should be deemed *per se* coercion and ruled inadmissible. The second argument is that using falsified DNA evidence to obtain

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<sup>9</sup> Bedau & Radelet, *supra* note 8, at 57–58.

<sup>10</sup> EDWARD CONNORS ET AL., CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL 12 (1996).

<sup>11</sup> See *id.* at 16–17.

<sup>12</sup> Drizin & Leo, *supra* note 3, at 905.

<sup>13</sup> *Id.*

<sup>14</sup> All Cases: Exoneration by DNA, INNOCENCE PROJECT, <http://www.innocenceproject.org/all-cases/#exonerated-by-dna> (last visited Aug. 7, 2016).

<sup>15</sup> Drizin & Leo, *supra* note 3, at 905.

a confession should just be one of several factors considered in weighing whether the confession is admissible in a criminal trial.<sup>16</sup>

This Note first examines the history of relevant law, explaining how confessions gained through the use of illegal police activity are involuntary and subsequently inadmissible. Next, the rationales for prohibiting involuntary confessions are discussed. In the United States, a jurisdictional split exists concerning the coerciveness of falsified evidence. This split is explained, with the underlying justifications on each side of the split expounded. Finally, this Note provides a comparative analysis between the two main arguments governing the use of falsified DNA evidence to obtain a confession: (1) that using falsified DNA evidence to obtain a confession should be deemed *per se* coercion and inadmissible in criminal cases, or (2) that using falsified DNA evidence to obtain a confession should be just one factor weighed in determining whether the confession is admissible under a totality of the circumstances test.

This Note concludes that using falsified DNA evidence to obtain a confession is *per se* coercive, and such a forced admission should be inadmissible in criminal cases. DNA evidence is more influential than almost any other type of evidence, therefore the use of fabricated DNA evidence will unduly influence suspects undergoing interrogation, who—under the Rational Choice Model<sup>17</sup>—will think that they are going to be found guilty regardless of their actual guilt or innocence because of the DNA evidence and will therefore confess to a crime in order to stop the interrogation. Additionally, allowing confessions gained from the use of fabricated evidence is a slippery slope that can lead to increased public distrust in the criminal justice system. Consequently, the use of fabricated DNA evidence to gain a confession violates a defendant's Fifth and Fourteenth Amendment rights of Due Process, and such an admission should be deemed *per se* coercion and inadmissible in criminal cases.

## I. BACKGROUND

### *A. Admissibility of Confessions Gained Through Illegal Police Activity.*

Police cannot use unwarranted coercive tactics to obtain a confession; the Due Process Clause of the Fourteenth Amendment prohibits the admission of such involuntary confessions.<sup>18</sup> Confessions are deemed involuntary if the defendant's will is overcome and his ability for self-determination is critically impaired.<sup>19</sup> In

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<sup>16</sup> See *People v. Mays*, 95 Cal. Rptr. 3d 219, 229–30 (Cal. Ct. App. 2009).

<sup>17</sup> Rational choice theory has a variety of definitions and uses, but ultimately posits that man will act to maximize his own best interests. Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051, 1060–66 (2000).

<sup>18</sup> See *Blackburn v. Alabama*, 361 U.S. 199, 205 (1960).

<sup>19</sup> *Schneckloth v. Bustamonte*, 412 U.S. 218, 225–26 (1973).

determining the voluntariness of a confession, a court looks at the totality of the circumstances to assess whether the police obtained evidence through objective or subjective coercion.<sup>20</sup> To decide whether a confession is the result of coercion, and therefore involuntary, the court should look at the totality of the circumstances to determine whether the police obtained evidence by making credible threats to the defendant, thereby overbearing his will, to make an unforced confession.<sup>21</sup>

While the court looks at the totality of the circumstances to determine whether a confession was coerced, the threshold question the court analyzes is whether the confession took place in the presence or absence of coercive police activity.<sup>22</sup> “[C]oercive police activity is a necessary predicate to the finding that a confession is not ‘voluntary’ within the meaning of the Due Process Clause of the Fourteenth Amendment.”<sup>23</sup> Therefore, if there is no coercive police activity, then the confession is likely admissible.

However, if there is coercive police activity, the next step is to determine whether the confession was still voluntary. There are three criteria used to determine voluntariness: “(1) whether the police activity was ‘objectively coercive;’ (2) whether the coercion overbore the will of the defendant; and (3) whether the coercive police activity was the ‘crucial motivating factor’ behind the defendant’s confession.”<sup>24</sup> Any statement that was not the product of the defendant’s free choice at that time it was made is deemed to be involuntary as a “fruit of the poisonous tree”<sup>25</sup>

In addition to these criteria, the voluntariness of a confession is determined by examining the conditions of the interrogation. For example, a court will consider the type and manner of the questioning used by police officers.<sup>26</sup> For example, if a suspect confesses because an officer confronts him with incriminating evidence found in the case, that confession will almost certainly be deemed voluntary because the officer acted properly. However, if the suspect confesses only after the officer engages in “police trickery,” by, for example, misrepresenting the strength of evidence against the suspect or pretending to be the suspect’s friend in order to illicit a confession, then the officer arguably acted improperly and the confession may be challenged as involuntary.<sup>27</sup>

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<sup>20</sup> See *Henson v. Commonwealth*, 20 S.W.3d 466, 469 (Ky. 1999) (citing *Arizona v. Fulminante*, 499 U.S. 279, 286–88 (1991) and *Allee v. Commonwealth*, 454 S.W.2d 336, 341 (Ky. 1970)).

<sup>21</sup> See *id.* (citing *Fulminante*, 499 U.S. at 286–88 and *Allee*, 454 S.W. 2d at 341).

<sup>22</sup> See *Colorado v. Connelly*, 479 U.S. 157, 167 (1986).

<sup>23</sup> *Id.*

<sup>24</sup> *Dye v. Commonwealth*, 411 S.W.3d 227, 232 (Ky. 2013) (quoting *Henson v. Commonwealth*, 20 S.W.3d 466, 469 (Ky. 1999)).

<sup>25</sup> See *Wong Sun v. United States*, 371 U.S. 471, 488 (1963).

<sup>26</sup> See *Springer v. Commonwealth*, 998 S.W.2d 439, 445–49 (Ky. 1999); *McClain v. Commonwealth*, 144 S.W.2d 816, 818 (Ky. 1940).

<sup>27</sup> 8 LESLIE W. ABRAMSON, KENTUCKY PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 19:53 (5th ed. 2010).

Additionally, some states, such as Kentucky, have enacted “anti-sweating statutes.”<sup>28</sup> Kentucky’s anti-sweating statute states that:

No peace officer, or other person having lawful custody of any person charged with crime, shall attempt to obtain information from the accused concerning his connection with or knowledge of crime by plying him with questions, or extort information to be used against him on his trial by threats or other wrongful means, nor shall the person having custody of the accused permit any other person to do so.<sup>29</sup>

Finally, a confession may be deemed involuntary under the due process clauses of either the federal or a state’s Constitution if it is “extracted by threats or violence, obtained by direct or implied promises, or secured by the exertion of improper influence.”<sup>30</sup> Gaining a confession through the use of falsified DNA evidence most aptly falls under the category of being secured by improper influence.

Consequently, if a police officer gains a confession using the above-mentioned illegal tactics, that confession should be deemed coercive and should not be admissible in a criminal trial. The rationales for prohibiting coerced confessions are discussed below.

### *B. Rationales For Prohibiting Involuntary Confessions.*

There are several rationales for prohibiting involuntary confessions and requiring confessions to be obtained properly under the Due Process Clause voluntariness standard instead. The Supreme Court has suggested three potential goals behind using this standard: “(1) ensuring that convictions are based on reliable evidence; (2) deterring improper police conduct; [and] (3) assuring that a defendant’s confession is the product of his free and rational choice.”<sup>31</sup> In addition to these objectives, there is a serious concern that false confessions lead to wrongful convictions.<sup>32</sup>

The seminal law review article outlining these rationales was published in the Harvard Law Review in 1966. The following sections draw heavily from this article.

*1. Reliable Evidence*—The first rationale for requiring the circumstances surrounding a confession to meet the Due Process Clause standard is that this standard will ensure that convictions are based on reliable evidence. Several

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<sup>28</sup> See, e.g., KY. REV. STAT. ANN. § 422.110 (West, Westlaw through the end of the 2015 Reg. Sess.); see also *Brown v. Commonwealth*, 275 S.W.2d 928, 932 (Ky. 1955) (referring to § 422.110 as “the anti-sweating statute”).

<sup>29</sup> § 422.110 (Westlaw).

<sup>30</sup> *People v. McWhorter*, 212 P.3d 692, 713 (Cal. 2009).

<sup>31</sup> *Developments in the Law—Confessions*, 79 HARV. L. REV. 935, 963–64 (1966).

<sup>32</sup> Drizin & Leo, *supra* note 3, at 960.

Supreme Court cases have cited this rationale when holding confessions inadmissible.<sup>33</sup> For example, in *Lyons v. Oklahoma*, the Court asserted that "[a] coerced confession is offensive to basic standards of justice . . . because declarations procured by torture are not premises from which a civilized forum will infer guilt."<sup>34</sup> Additionally, in *Stein v. New York*, the Court stated that "reliance on a coerced confession vitiates a conviction because such a confession combines the persuasiveness of apparent conclusiveness with what judicial experience shows to be illusory and deceptive evidence."<sup>35</sup>

2. *Deterrence*—While ensuring that convictions were based on reliable evidence seemed to be the main reason for excluding involuntary confessions at early common law, the Court has also noted that the Due Process Clause standard can deter police misconduct.<sup>36</sup> For example, in *Rogers v. Richmond*, the police led suspect to believe they were about to take the suspect's ailing wife into custody for questioning.<sup>37</sup> Even though the reliability of the suspect's confession may not have been questioned, The Court held that the use of a legal standard that took into account the "probable truth or falsity" of the confession was "not . . . permissible . . . under the Due Process Clause of the Fourteenth Amendment."<sup>38</sup> Court dictum in the *Rogers* case provided that:

[C]onvictions following the admission into evidence of confessions which are . . . the product[s] of coercion . . . cannot stand . . . not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system . . .<sup>39</sup>

By focusing on the police tactics used to obtain a confession rather than on the likely truthfulness of the confession, the exclusionary rule applied in confession cases is similar to Fourth Amendment law excluding evidence obtained from an unlawful search or seizure.<sup>40</sup> In both instances, the Court is applying the exclusionary rule to deter police from engaging in "outrageous" or "illegal" behavior. The rationale is that by not admitting confessions that result from coercion, police are then incentivized to conduct proper interrogations.<sup>41</sup> One perceived benefit of using police misconduct as the guidepost is that the test is inherently more

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<sup>33</sup> See generally *Developments in the Law—Confessions*, *supra* note 31, at 964–68 (discussing the Court's findings on due process and testimonial reliability in several cases).

<sup>34</sup> *Lyons v. Oklahoma*, 322 U.S. 596, 605 (1944).

<sup>35</sup> *Stein v. New York*, 346 U.S. 156, 192 (1953).

<sup>36</sup> See generally *Developments in the Law—Confessions*, *supra* note 31, at 968–73 (discussing Supreme Court cases and opinions concerning the Due Process Clause and police practices).

<sup>37</sup> *Rogers v. Richmond*, 365 U.S. 534, 535–36 (1961).

<sup>38</sup> *Id.* at 543–44.

<sup>39</sup> *Id.* at 540–41.

<sup>40</sup> *Developments in the Law—Confessions*, *supra* note 31, at 969.

<sup>41</sup> *Id.*

objective because it does not take into account the suspect's state of mind at the time of the confession.<sup>42</sup>

The first case applying this technique was *Ashcraft v. Tennessee*.<sup>43</sup> In that case, the Court held that allowing an interrogation to last thirty-six hours rendered the confession involuntary, even though the suspect did not seem to be physically or mentally affected by the length of the interview.<sup>44</sup> Regardless of the suspect's subjective well-being, the Court chastised the officers' behavior as "reminiscent of the tactics used by 'governments which convict individuals with testimony obtained by police organizations possessed of an unrestrained power to seize persons . . . , hold them in secret custody, and wring from them confessions by physical or mental torture.'"<sup>45</sup>

Additionally, police officers must obey the very laws that they are entrusted to enforce. As the Court stated in *Spano v. New York*, "in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves."<sup>46</sup> For example, the Court of Criminal Appeals of Texas has suppressed a confession because it was obtained in violation of state law.<sup>47</sup> In *Wilson v. State*, a detective fabricated a crime lab report on his computer and then presented the false document to the suspect.<sup>48</sup> The document stated that Wilson's fingerprints were found on a magazine clip at a murder scene.<sup>49</sup> Wilson confessed eleven minutes after he was presented with the forged report and told that forensic evidence was infallible.<sup>50</sup>

Wilson moved to suppress his confession, and on appeal argued that the officer violated Texas statutes prohibiting tampering with evidence and tampering with a governmental record.<sup>51</sup> The State argued that the statute prohibiting tampering with evidence was aimed at preventing individuals from defrauding the government and did not apply to law enforcement pursuing an investigation.<sup>52</sup> The court disagreed, reasoning that, "[i]f police officers were free to manufacture physical evidence and fabricate documents to use in interrogating suspects, courts would no longer be able to routinely rely upon law enforcement or crime-lab reports as being accurate and reliable."<sup>53</sup>

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<sup>42</sup> *Id.*

<sup>43</sup> *Ashcraft v. Tennessee*, 322 U.S. 143 (1944); *Developments in the Law—Confessions*, *supra* note 31, at 969 (identifying *Ashcraft* as the first case applying this technique).

<sup>44</sup> See *Developments in the Law—Confessions*, *supra* note 31, at 969.

<sup>45</sup> *Id.* (quoting *Ashcraft*, 322 U.S. at 155).

<sup>46</sup> *Id.* at 972 (citing *Spano v. New York*, 360 U.S. 315, 320–21 (1959)).

<sup>47</sup> *Wilson v. State*, 311 S.W.3d 452, 464 (Tex. Crim. App. 2010).

<sup>48</sup> *Id.* at 454.

<sup>49</sup> *Id.* at 455.

<sup>50</sup> See *id.*

<sup>51</sup> *Id.* at 456–57.

<sup>52</sup> *Id.* at 459.

<sup>53</sup> *Id.* at 463.



Although deterring police misconduct is a plausible rationale for suppressing confessions, case law indicates that, in practice, whether or not a confession was obtained in violation of state law may not matter.<sup>54</sup> For example, courts routinely uphold convictions based on confessions obtained in violation of state law, while excluding confessions that did not involve the violation of a state statute.<sup>55</sup> Instead of being dispositive, police misconduct that violates a state statute may simply strengthen the argument that a confession should be suppressed.<sup>56</sup>

For example, in finding a confession to be inadmissible in *Haynes v. Washington*, the Court held that police violated a state statute by holding a suspect in solitary detention for sixteen hours.<sup>57</sup> In holding that the police conduct was offensive, the Court focused not on the violation of the state statute, but on the police misconduct itself, stating that "the basic techniques present here—the secret and incommunicado detention and interrogation—are devices adapted and used to extort confessions from suspects."<sup>58</sup> By relegating mention of the state statute violation to a footnote in its decision, the Court seemingly relied mostly on whether police misconduct violate Haynes' due process rights, rather than on whether it violated a Washington statute.<sup>59</sup>

*3. Free and Rationale Choice*—The third rationale for prohibiting involuntary confessions involves assuring that a defendant's confession is freely and rationally given.<sup>60</sup> To determine this, the Supreme Court has focused on how the defendant responded psychologically to police pressure exerted during detentions and interrogations in which the police obtained a confession.<sup>61</sup> This approach assumes that the accused has a constitutionally protected right to freely choose whether or not to confess.<sup>62</sup>

Early Supreme Court cases held that a suspect's choice to confess was free from unfair pressure as long as it was not obtained from physical or psychological torture.<sup>63</sup> However, as methods for obtaining confessions have evolved, so has the law in determining whether the confession gained was requisitely voluntary,<sup>64</sup> a result of a "free and rational" choice.<sup>65</sup> By requiring that a confession be freely given, the Court is attempting to preserve an individual's fundamental trial rights

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<sup>54</sup> See *Developments in the Law—Confessions*, *supra* note 31, at 972.

<sup>55</sup> See *id.* (comparing *Gallegos v. Nebraska*, 342 U.S. 55 (1951), with *Townsend v. Sain*, 372 U.S. 293 (1963)).

<sup>56</sup> See *id.*

<sup>57</sup> *Haynes v. Washington*, 373 U.S. 503, 510 n.7 (1963).

<sup>58</sup> *Id.* at 514.

<sup>59</sup> *Developments in the Law—Confessions*, *supra* note 31, at 972.

<sup>60</sup> See *id.* at 973.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* (citing *United States v. Mitchell*, 322 U.S. 65, 68 (1944) (dictum)).

<sup>64</sup> *Id.* (citing *Spano v. New York*, 360 U.S. 315, 321 (1959)).

<sup>65</sup> *Id.* at 973–74 (citing *Mitchell*, 322 U.S. at 68).

from being taken away before the trial even begins.<sup>66</sup> The goal in this case is not necessarily to deter police misconduct, because the police may not be at fault.<sup>67</sup> For example, in *Townsend v. Sain*, the defendant's confession was held inadmissible because it was elicited after he was given a drug with the properties of a "truth serum."<sup>68</sup> The Court reasoned that it did not matter whether the police knew of hycosine's truth serum effects or not, because the effects of the drug still prevented the defendant from confessing of his own volition. Therefore, even if officers act properly, a confession is still inadmissible if it is not obtained as a free and rational choice of the suspect.

4. *Wrongful Convictions*—People who falsely confess after an interrogation are likely to be wrongfully punished. This happens in two ways. In the first scenario, an innocent defendant pleads guilty to avoid an anticipated harsher punishment. In the second scenario, a judge or jury wrongfully convicts the defendant at trial.<sup>69</sup> One survey found that over eighty percent of innocent people who chose to go to trial were subsequently wrongfully convicted.<sup>70</sup> These convictions, which were generally based only on a confession that was subsequently proven false, indicate "that confession evidence is inherently prejudicial and highly damaging to a defendant, even if it is the product of coercive interrogation, even if it is supported by no other evidence, and even if it is ultimately proven false beyond any reasonable doubt."<sup>71</sup>

The rationales for excluding involuntary confessions are important to keep in mind when determining whether the use of falsified evidence in obtaining confessions should be considered under the totality of the circumstances test or whether it should be deemed *per se* coercive thereby violating the defendant's Due Process rights and inadmissible. Clearly instances like the one discussed above, in which false confessions are used to wrongfully convict and incarcerate innocent people, weigh heavily in favor of prohibiting the use of falsified evidence in obtaining confessions completely rather than weighing it against a totality of the circumstances standard.

*C. There Is A Jurisdictional Split Concerning The Coerciveness of Falsified Evidence.*

Currently, jurisdictions are split as to whether the use of fabricated tangible evidence is coercive *per se* or whether it is only a factor to be considered in the

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<sup>66</sup> *Id.* at 974 (citing Comment, *The Coerced Confession Cases in Search of a Rationale*, 31 U. CHI. L. REV. 313, 321 (1964)).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* (citing *Townsend v. Sain*, 372 U.S. 293, 298 (1963)).

<sup>69</sup> Drizin & Leo, *supra* note 3, at 960.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 960–61.

totality of the circumstances. New Jersey has adopted bright-line rules forbidding the use of false documents in police interrogation.<sup>72</sup> Florida adopted its bright-line rule in response to *State v. Cayward*, a case in which the police used fabricated documents that showed results of a scientific test indicating that the defendant left semen stains on the victim's underwear.<sup>73</sup> Although it did not adopt a bright-line rule, Kentucky recently enacted a rebuttable presumption of coercion when a defendant can show that the police used falsified documents to induce a confession.<sup>74</sup>

Some states, like Maryland, look at the totality of the circumstances and weigh the false evidence as one factor.<sup>75</sup> Still other states, such as California, have repeatedly found that fabricated tangible evidence used to elicit a confession is not coercive.<sup>76</sup> However, all available cases in which California has found falsifying evidence not to be coercive have involved the authorities informing the suspect of the false evidence against him, rather than presenting the suspect with hard tangible evidence.<sup>77</sup>

While some states have come down on either side of the argument, finding falsifying tangible evidence to be *per se* coercive like New Jersey or Florida or finding it not to be coercive like California, in many states the issue is a matter of first impression.

## II. THE USE OF FALSIFIED DNA EVIDENCE TO OBTAIN A CONFESSION SHOULD BE DEEMED *PER SE* COERCION AND RULED INADMISSIBLE BECAUSE IT VIOLATES A DEFENDANT'S DUE PROCESS RIGHTS

The self-incrimination clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment prohibit involuntary confessions. Confessions that are obtained through coercion are found to be involuntary and are inadmissible at trial.<sup>78</sup> The use of falsified DNA evidence to obtain a confession should be deemed *per se* coercion for several reasons. First, DNA evidence is more influential than other evidence. Second, defendants know that DNA evidence is more influential than other evidence, and when presented with DNA evidence,

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<sup>72</sup> *State v. Patton*, 826 A.2d 783, 802 (N.J. 2003).

<sup>73</sup> *State v. Cayward*, 552 So. 2d 971, 972, 974 (Fla. Dist. Ct. App. 1989).

<sup>74</sup> *Gray v. Commonwealth*, No. 2013-SC-000374-MR, 2016 WL 673058, at \*5 (Ky. Feb. 18, 2016).

<sup>75</sup> *Lincoln v. State*, 882 A.2d 944, 950–51, 957 (Md. Ct. Spec. App. 2005).

<sup>76</sup> See, e.g., *People v. Smith*, 150 P.3d 1224, 1237, 1241–42 (Cal. 2007) (finding that a “Neutron Proton Negligence Intelligence Test” was a sham, but that its use was not “so coercive that it tended to produce a statement that was involuntary or unreliable”); *People v. Musselwhite*, 954 P.2d 475, 489 (Cal. 1998) (suspect confessed after being falsely told that his fingerprints were found, but the court found that “the circumstances in which the statements were made by the detectives to defendant, as well as the statements themselves, [f]ell short of what is required to make out a case of prejudicial deception”).

<sup>77</sup> See VINCENT J. O'NEILL, JR., CALIFORNIA CONFESSIONS LAW §1.36 (database updated Dec. 2015).

<sup>78</sup> 18 U.S.C. § 3501 (2016); *Dickerson v. United States*, 530 U.S. 428, 433 (2000).

they are more likely than those not presented with DNA evidence to confess. Under the Rational Choice Model, defendants will think that they are going to be found guilty regardless of their actual guilt or innocence based on DNA evidence and will therefore confess to a crime in order to stop the interrogation. Third, this type of confession goes against the rationales purported by the Supreme Court that confessions should be reliable, made free of police misconduct, and the result of the defendant's free and rational choice. Fourth, allowing confessions based on falsified DNA evidence is a slippery slope that could lead to severe mistrust in the American criminal justice system. Fifth, the use of falsified DNA evidence will likely have an exorbitant negative disparate impact on certain groups such as juveniles, poor people, and uneducated individuals.

Consequently, because of the above-stated reasons, the use of falsified DNA evidence to obtain a confession should be deemed *per se* coercive (and any subsequent confession should be held inadmissible in a criminal trial), rather than simply one factor to be weighed under a totality of the circumstances test.

*A. Fabricating DNA evidence is more influential than fabricating other types of evidence because DNA evidence is more influential than almost any other type of evidence.*

Many studies have been conducted on the uses of DNA evidence at trial and the effects of this use on jurors.<sup>79</sup> Three studies conducted on several hundred undergraduate students and representative jurors by psychologists at the University of Nevada, Las Vegas and other institutions focused on: (a) the subjects' perceptions of scientific evidence; (b) the influence of DNA evidence as compared to other types of evidence; and (c) the limitations of DNA testimony.<sup>80</sup> This study concluded that jurors give unfair weight to DNA evidence presented at trial, as jurors found DNA evidence to be ninety-five percent accurate and ninety-four percent persuasive.<sup>81</sup>

Studies like this lend credence to the statement that "[n]ot all fabricated documents carry the same weight of authority and have the same influential power to affect thinking."<sup>82</sup> For example, in *Lincoln v. State*, the use of fabricated documents was deemed not to be coercive because the documents were falsified handwritten statements instead of "official, scientific, or government documents."<sup>83</sup>

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<sup>79</sup> See, e.g., Joel D. Lieberman et al., *Gold versus Platinum: Do Jurors Recognize the Superiority and Limitations of DNA Evidence Compared to Other Types of Forensic Evidence?*, 14 PSYCHOL. PUB. POL'Y & L. 27, 27-28 (2008).

<sup>80</sup> *Id.* at 29-31, 33-34.

<sup>81</sup> See *id.* at 44, 52; see also *id.* at 35 (Undergraduate students also found DNA evidence to be highly accurate and persuasive.).

<sup>82</sup> *Lincoln v. State*, 882 A.2d 944, 956 (Md. Ct. Spec. App. 2005).

<sup>83</sup> *Id.* at 959.

As such, “[t]hey did not create an appearance of authority and reliability as would, for example, DNA tests presented on the stationery of a police crime laboratory.”<sup>84</sup>

Furthermore, unlike in the *Cayward* case, discussed below, the fabricated evidence was not the clear impetus for the confession. In *Lincoln*, the suspect’s demeanor did not change when faced with false evidence, and he did not confess until he heard his mother’s statement implicating him.<sup>85</sup> This difference indicates the severe impact that the falsification of DNA evidence can have on a defendant in comparison to the falsification of other evidence.

The West Virginia Supreme Court in *State v. Farley* also noted the difference between acceptable police interrogation techniques and fabricating hard evidence. The Court stated, “[w]e definitely draw a demarcating line between police deception generally, which does not render a confession involuntary *per se*, and the manufacturing of false documents by the police which ‘has no place in our criminal justice system.’”<sup>86</sup>

Both *Lincoln* and *Farley* suggest that although falsifying some evidence may be looked at in the totality of the circumstances view as just one element in determining whether the confession should be thrown out, falsifying certain types of evidence, such as DNA evidence, is subject to stricter scrutiny.

*B. Under the Rational Choice Model, defendants will think that they are going to be found guilty regardless of their actual guilt or innocence based on the DNA evidence and will therefore confess to a crime in order to stop the interrogation.*

The Rational Choice Model is a theory that explains the dynamics of false confessions. This model suggests that when faced with overwhelming evidence, the innocent suspect may rationally conclude that the costs of his confession are relatively low because he is likely to be convicted regardless of whether he confesses.<sup>87</sup> In her article, Miriam Gohora suggests that suspects will weigh “against these lowered costs of confession . . . its relatively high benefits; the suspect may be spared a harsh penalty in the long term, and in the short term the stress of an interrogation may be ameliorated or truncated.”<sup>88</sup>

The presence of damning forged tangible evidence—such as fabricated DNA evidence—may significantly affect the cost-benefit analysis in the Rational Choice Model.<sup>89</sup> For example, suppose an innocent suspect is being interrogated for a murder. In the first scenario, the police have no tangible evidence trying the suspect to the crime scene. In this situation, confessing to the crime would carry a lot of

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<sup>84</sup> *Id.* (emphasis added).

<sup>85</sup> *Id.* at 959.

<sup>86</sup> *State v. Farley*, 452 S.E.2d 50, 60 n.13 (W. Va. 1994) (citing *State v. Cayward*, 552 So. 2d 971, 974 (Fla. Dist. Ct. App. 1989)).

<sup>87</sup> See Miriam S. Gohora, *A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 FORDHAM URB. L.J. 791, 817–19 (2006).

<sup>88</sup> *Id.* at 818 (footnote omitted).

<sup>89</sup> See *id.* at 818–19.

costs and no benefits and the suspect is unlikely to confess. Now imagine the same innocent suspect is presented with a gun that supposedly has his DNA on it as well as a lab report that says the suspect's DNA was also found at the scene. The Rational Choice Theory holds that the presence of this overwhelming evidence, even though it is fabricated, gives this same innocent suspect reason to confess even though he did not the crime. In this situation, even though the suspect's choice to confess may be rational, it is still compelled from the falsified evidence rather than resulting from his guilty conscious. This kind of police coercion makes the defendant's confession involuntary and admitting such a confession at trial violates the defendant's Due Process rights.

In *State v. Patton*, New Jersey cited *Cayward's* proposition that "[i]t may well be that a suspect is more impressed and thereby more easily induced to confess when presented with tangible, official-looking reports as opposed to merely being told that some tests have implicated him."<sup>90</sup> The court also drew on language from a Nevada Supreme Court case concerning the drawbacks to using fabricated evidence, noting that allowing law enforcement to obtain a confession using fabricated documents provides police and prosecutors with an investigatory device "they have little if any need for, but which has great potential for intentional abuse and inadvertent harm and havoc."<sup>91</sup> In both the Nevada case and in *Patton*, the courts found that the law should question the reliability of a confession prompted "by confrontation with ostensibly irrefutable hard scientific evidence, as opposed to mere oral allegations."<sup>92</sup>

Similar to the Rational Choice Model is the theory of the CSI Effect. The CSI Effect suggests that jurors in criminal cases expect DNA evidence to be put on at trial and hold prosecutors to a higher standard by requiring them to produce this evidence.<sup>93</sup> This implies that jurors find DNA evidence overwhelmingly convincing and reliable. The CSI Effect can also be applied to suspects undergoing interrogation. Just as a lay juror finds DNA evidence convincing, so does the suspect who is confronted with DNA evidence (even false DNA evidence) by police officers in the interrogation room. When a suspect is presented with such overwhelming "evidence," he may feel he has no choice but to confess and hope for a plea bargain, regardless of whether he actually committed the crime. In his mind, it is more rational to cease the interrogation.

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<sup>90</sup> *State v. Patton*, 826 A.2d 783, 794 (N.J. Super. Ct. App. Div. 2003) (quoting *Cayward*, 552. So.2d at 974).

<sup>91</sup> *Id.* at 796 (quoting *Sheriff v. Bessey*, 914 P.2d 618, 622 (Nev. 1996) (Rose, J., dissenting)).

<sup>92</sup> *Id.* at 797 (quoting *Bessey*, 914 P.2d at 622 (Rose, J., dissenting)).

<sup>93</sup> See, e.g., *Coleman v. State*, 2010 Ark. App. 497, at 1, 3, 2010 WL 3582439, at \*6; *State v. Jones*, 33 So. 3d 306, 327 (La. Ct. App. 2010); *Charles v. State*, 997 A.2d 154, 157 (Md. 2010); *Kelly v. State*, 6 A.3d 396, 412 n.15 (Md. Ct. Spec. App. 2010); *Commonwealth v. Seng*, 924 N.E.2d 285, 296–97 (Mass. 2010).

*C. Using fabricated evidence is a slippery slope that can lead to false confessions and a public distrust in the criminal justice system.*

In addition to these theories that posit that some evidence carries more weight than other evidence is the suggestion that the use of fabricated DNA evidence may lead to false confessions and a public distrust in the criminal justice system. Such reasoning was applied in the *Cayward* case.<sup>94</sup> In *Cayward*, the police showed the defendant falsified police reports to induce a confession during the course of the two-hour interrogation.<sup>95</sup> In this case, although the defendant was at the interrogation voluntarily, was not under arrest, and had waived his *Miranda* rights, the Florida court still held that "the manufacturing of false documents by police officials offends our traditional notions of due process of law under both the federal and state constitutions."<sup>96</sup> The court reasoned that the police should not "knowingly fabricate tangible documentation or physical evidence" and that doing so may have many negative consequences in the criminal justice system.<sup>97</sup>

The Florida court was concerned about several consequences of using fabricated tangible evidence, including the chance that fabricated documents may accidentally make their way into court as evidence or into the media, the slippery slope that may follow the court's condoning of forgery of documents, and the loss of public trust in a police force that can fabricate evidence to elicit confessions.<sup>98</sup> Due to these concerns, the court affirmed the illegality of the fabrication of tangible evidence.<sup>99</sup>

*D. Using falsified DNA evidence will likely have an inordinate disparate impact on marginalized groups of society, thereby increasing the negative impact on these individuals.*

Certain subsets of criminal defendants are more likely to be exposed to police misconduct and coercion than others. These include juveniles, minorities, indigent persons, and the uneducated. These groups typically face police coercion because they are less knowledgeable of the rules surrounding and governing the criminal justice system and may not be able to afford a lawyer to protect their best interests. False confessions from members of these groups that stem from police coercion are subsequently discussed. It seems unfathomable to give police even more power over these groups by potentially admitting into court confessions obtained through the use of falsified DNA evidence.

Coercing children to falsely commit to serious crimes they did not commit should never happen. Unfortunately, it does. One study revealed that seven

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<sup>94</sup> See *State v. Cayward*, 552 So. 2d 971, 974-75 (Fla. Dist. Ct. App. 1989).

<sup>95</sup> *Id.* at 972.

<sup>96</sup> *Id.* at 972, 974.

<sup>97</sup> *Id.* at 974-75.

<sup>98</sup> *Id.*

<sup>99</sup> See *id.*

children in the population surveyed, all under the age of fourteen, confessed to crimes they did not commit after being subjected to police interrogations.<sup>100</sup> Among these were a nine-year-old boy who falsely confessed to setting a fire that destroyed a factory in town, an eleven-year-old boy who falsely confessed to murdering his elderly neighbor, and a seven-year-old and eight-year-old who falsely confessed to the joint murder of an eleven-year-old girl.<sup>101</sup> The lack of video evidence from the police interrogations that lead to most of these false confessions in juvenile cases obscures the specific method used to gain the confession; however, simply wanting to go home was a prevailing reason given by adolescents for their confession.<sup>102</sup>

This correlates directly with the Rational Choice Model discussed earlier in this note, which suggests that when faced with overwhelming evidence, an innocent suspect may rationally conclude that benefits of confessing outweigh the costs.<sup>103</sup> These theories are especially relevant when juveniles are charged with adult crimes and may be overwhelmed by the criminal justice process, most likely do not understand their rights, and are unable to appreciate the long-term consequences of falsely confessing, but who readily understand the longing to simply end the interrogation and go home.

Another group especially vulnerable to the negative effects of allowing the use of falsified DNA evidence in interrogations is the mentally handicapped.<sup>104</sup> In *Atkins v. Virginia*, the Supreme Court held that the Constitution prohibited the application of the death penalty to mentally handicapped persons, in part because these individuals face a special risk of wrongful execution because they are more likely to confess to crimes they did not commit.<sup>105</sup> Similarly to the mentally handicapped, mentally ill individuals are also more likely to confess to crimes they did not commit,<sup>106</sup> also making them more vulnerable to police coercion.

Other groups that are likely to be negatively impacted by allowing police officers to use falsified DNA evidence during interrogations are the indigent and uneducated. What members of these groups have in common is that they are among the least likely to have representation during a police interrogation due to their inability to afford an attorney and/or their inability to understand their *Miranda* rights to have an attorney present. Police officers hold a tremendous amount of power over suspects during interrogation. To give authorities more power over such marginalized groups of people—for example, the mentally handicapped or impoverished persons—by allowing them to present falsified DNA

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<sup>100</sup> Drizin & Leo, *supra* note 3, at 963–64.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 969.

<sup>103</sup> Gohara, *supra* note 87, at 817.

<sup>104</sup> Drizin & Leo, *supra* note 3, at 970.

<sup>105</sup> *Atkins v. Virginia*, 536 U.S. 304, 320 & n.25 (2002).

<sup>106</sup> See Drizin & Leo, *supra* note 3, at 973.



evidence to gain confessions is particularly disconcerting. Such ill-gotten confessions are most definitively the result of coercive police misconduct.

*E. Using falsified DNA evidence to obtain a confession should not just be one of several factors considered in weighing whether the confession comes in, but should be deemed per se coercive and the resulting confession inadmissible.*

Some courts find that using falsified evidence to obtain a confession is not coercive *per se*, but is simply part of normal police interrogation techniques, and thus is just one factor among several in considering whether the confession comes in.<sup>107</sup> For example, the Supreme Court has refused to find that a defendant, who confesses after police misrepresented statements made by his codefendant, does so involuntarily.<sup>108</sup> The Court has also found that a defendant's ignorance that a prior coerced confession could not be admitted in evidence does not compromise the voluntariness of his guilty plea.<sup>109</sup>

Similarly, in *California v. Beheler*, the Court found that a defendant's interview with the police was not involuntary simply because he was unaware of the potential adverse consequences of his statements.<sup>110</sup> In *Oregon v. Elstad*, the Court stated that "we have not held that the *sine qua non* for a knowing and voluntary waiver of the right to remain silent is a full and complete appreciation of all of the consequences flowing from the nature and the quality of the evidence in the case."<sup>111</sup>

Given the Supreme Court's and lower courts' previous holdings that whether confession evidence should be admitted is based on a totality of the circumstances, it is reasonable to believe that some courts would not find the use of police falsifying DNA evidence to obtain a confession to be *per se* coercive.<sup>112</sup> Instead these courts might rely on previous holdings and use a totality of the circumstances test to determine whether the confession comes in.<sup>113</sup>

There are several benefits to using a totality of the circumstances test to determine whether a confession is admissible in a criminal trial. First, potentially useful evidence is not automatically excluded. Therefore, a true confession, though gained through police misconduct, may still be admissible in court. The benefit of admitting this confession at trial is that a trier of fact hears more evidence on which to base its decision of guilt or innocence. Additionally, if a true confession is admissible in court, it is more likely to lead to the person who committed the crime being convicted for the crime. Relatedly, a consequence of deeming all confessions

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<sup>107</sup> See, e.g., *Frazier v. Cupp*, 394 U.S. 731, 739 (1969).

<sup>108</sup> *Id.*

<sup>109</sup> *McMann v. Richardson*, 397 U.S. 759, 769 (1970).

<sup>110</sup> *California v. Beheler*, 463 U.S. 1121, 1125 n.3 (1983).

<sup>111</sup> *Oregon v. Elstad*, 470 U.S. 298, 317 (1985).

<sup>112</sup> Cf. *Frazier*, 394 U.S. at 739 (holding that police use of falsified statements did not render a confession involuntary under the totality of the circumstances).

<sup>113</sup> See *id.*

gained through the use of falsified DNA evidence as *per se* coercive is that some true confessions will not be admissible. Additionally, because confessions play such a large role in convicting a defendant, not having this confession might result in some guilty individuals being found innocent.

However, these benefits must be weighed against the consequences of allowing the use of falsified DNA evidence to be considered in the totality of the circumstances. On the whole, the consequences far outweigh any potential benefit. The most severe consequence of using the totality of the circumstances test is that innocent people may be tricked into making a false confession, and because confessions are highly regarded in court, those people may be convicted for crimes they did not commit. The end result is that innocent people wind up spending years in jail for crimes they did not commit.<sup>114</sup> It is extremely difficult to overturn a conviction. Instead, there are “the notions that jury verdicts are sound and [that] principles of finality and deference should prevail without overwhelming evidence of innocence.”<sup>115</sup> Relatedly, prosecutors and investigators may be reluctant to reopen a case because they believe the right person is behind bars.<sup>116</sup> Furthermore, even with new evidence of innocence and a desire to move forward, appeals can be time consuming and costly. Not everyone has the resources needed to undertake such an endeavor.

Another consequence of using the totality of the circumstances standard is that police may turn to creating false documents and breaking the law in order to garner a confession they could not get through ordinary police interrogation. Additionally, people will lose trust in the criminal justice system if there is prolonged and prolific police misconduct.<sup>117</sup> As the court stated in *Haynes v. Washington*, “official misconduct cannot but breed disrespect for law, as well as for those charged with its enforcement.”<sup>118</sup>

Finally, an approach which finds the fabrication of DNA evidence *per se* coercive should be “the *test* used to determine whether a challenged confession is voluntary is utterly divorced from the probable veracity of that confession,” since using “coerced confessions is constitutionally objectionable not only due to the danger that they are false or unreliable but also because the methods used to obtain them are offensive to some of our society’s core values.”<sup>119</sup> Therefore, “the

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<sup>114</sup> Kimberly Cogdell Boies, *Misuse of DNA Evidence is Not Always a “Harmless Error”*: DNA Evidence, Prosecutorial Misconduct, and Wrongful Conviction, 17 TEX. WESLEYAN L. REV. 403, 428 (2011).

<sup>115</sup> *Id.* (citing Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 WIS. L. REV. 35, 36 (2005)).

<sup>116</sup> *Id.*

<sup>117</sup> See *supra* text accompanying note 94.

<sup>118</sup> *Haynes v. Washington*, 373 U.S. 503, 519 (1963).

<sup>119</sup> Michael D. Pepson & John N. Sharifi, *Lego v. Twomey: The Improbable Relationship Between an Obscure Supreme Court Decision and Wrongful Convictions*, 47 AM. CRIM. L. REV. 1185, 1208 (2010).

likelihood that the confession is untrue . . . is [not] the sole interest at stake."<sup>120</sup> Instead, "the categorical proscription against the use of coerced confessions . . . gives concrete substance to a 'complex of values' that—even today—undergirds this constitutional stricture, all of which are inextricably intertwined . . . ."<sup>121</sup> In this instance, it is a combination of the likelihood that the confession is untrue, as well as the preservation of the individual's freedom and the desire to curb police misconduct that work together to prohibit the use of involuntary confessions.<sup>122</sup> Given these reasons, it is clear that the use of falsified DNA evidence should be deemed *per se* coercive and the resulting confession deemed inadmissible in a court of law. Anything less would be a violation of the defendant's Due Process rights.

### CONCLUSION

Summarily, it has long been established that in order to be admitted in a court of law confessions must be voluntary. Confessions that are deemed involuntary—because they are unreliable, the result of police misconduct, or not the result of free and rational thought—are inadmissible. In recent years, with the advancement of DNA evidence use in trials, more confessions are being obtained. While the use of DNA evidence at trials can be beneficial for both exonerating the innocent and putting the guilty behind bars, the use of falsified DNA evidence in obtaining a confession should be deemed *per se* coercive and, therefore, the resulting confession should be inadmissible.

The use of falsified DNA evidence in obtaining confessions has startling potential negative impacts, the most significant one being the increase of false confessions among innocent people. This one potential negative impact far outweighs any benefit that obtaining a confession through falsified DNA evidence may garner. Falsely convicting innocent people is, in part, what the use of DNA evidence is intended to protect against. Allowing such confessions to be admitted in a criminal trial goes against the rationales of voluntary confessions and instead creates situations in which the suspect's Due Process rights are violated. As venerable Judge Learned Hand remarked, "Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream."<sup>123</sup> Consequently, states should adopt the rule that police use of false DNA evidence to obtain a confession is *per se* coercion and subsequently find the resulting confession inadmissible in a criminal case.

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<sup>120</sup> *Id.* (quoting *Blackburn v. Alabama*, 361 U.S. 199, 207 (1960)).

<sup>121</sup> *Id.* (quoting *Blackburn*, 361 U.S. at 207).

<sup>122</sup> *See id.* (quoting *Blackburn*, 361 U.S. at 207).

<sup>123</sup> *United States v. Garsson*, 291 F. 646, 649 (S.D.N.Y. 1923).